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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GILBERT A. HARING, Lieutenant,
Arlington County Police Department, *et. al.*,
Petitioners,

vs.

JOHN FRANKLIN PROSISE,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW POST-CONVICTION ASSISTANCE PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW POST-CONVICTION ASSISTANCE PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is filed pursuant to Rule 36.2 of this Court. Consent to file has been granted by David R. Lasso, Esq., City Attorney for the City of Falls Church, Virginia, Counsel for Petitioners, and by Norman A. Townsend, Esq., Counsel for Respondent. Letters of consent of both parties accompany this filing.

INTEREST OF THE *AMICUS CURIAE*

The Post-Conviction Assistance Project (P-CAP) is a Virginia nonprofit corporation organized and staffed by student volunteers at the University of Virginia School of Law. Since its establishment in 1971, P-CAP has advocated respect for the often ignored rights of incarcerated Virginians. Despite waning student concern for public interest law and budgetary constraints that severly limit such efforts, P-CAP members represent inmates in disciplinary hearings at four Virginia prisons, answer inquiries and requests for legal assistance from *pro se* litigants, and provide research assistance and direct representation in federal habeas corpus and 42 U.S.C. § 1983 suits, pursuant to third-year practice rules of the Court of Appeals for the Fourth Circuit. Faculty members of the School of Law and Virginia attorneys in private practice provide supervision.

P-CAP receives its funding from University of Virginia student activities funds, the University of Virginia Law School Foundation, and private donations. It has no financial interest in the outcome of this case.

P-CAP's interest as *amicus curiae* arises from its experience working with *pro se* litigants in federal courts. This experience has made P-CAP members aware of the need for clear rules governing access to federal courts in habeas corpus and § 1983 cases. *Pro se* litigants face formidable procedural barriers to the assertion of meritorious claims, too often merely because the rules governing access to a federal forum are undefined or cannot be generally understood. As the law regulating such access becomes increasingly complex, it is the artful jailhouse lawyer or the inmate lucky enough to receive professional assistance whose petitions receive the attention of federal courts. The claims of genuinely aggrieved *pro se* litigants are frequently ignored and dismissed on procedural grounds. The concern of *amicus curiae* is that the law regulating access to a federal forum under § 1983 should not be structured to frustrate litigation of meritorious constitutional claims.

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SUMMARY OF THE ARGUMENT

The Judicial Code, 28 U.S.C. § 1738 (1976), requires that federal courts give full faith and credit to the judgments of state courts. Under the command of § 1738, state judgments are to be given the same preclusive or nonpreclusive effect by federal courts as they would be by courts of the judgment-rendering state. A federal court may give a state judgment no greater effect than it has under the res judicata rules chosen by the state rendering judgment. *Union & Planters' Bank v. Memphis*, 189 U.S. 71 (1903). This principle is reaffirmed in the language of *Kremer v. Chemical Construction Corp.*, 102 S. Ct. 1883 (1982).

Virginia would not give preclusive effect to its judgment of conviction on a plea of guilty as to fourth amendment issues not actually and necessarily determined therein. Antecedent constitutional claims are neither actually nor necessarily determined when a conviction is based on a guilty plea, partly because the plea of guilty is itself sufficient to support the conviction, notwithstanding any evidentiary hearing on the plea. Respondent's § 1983 suit does not present the same cause of action as his criminal trial, nor is the legality of the search and seizure an issue actually and necessarily determined by the prior criminal proceeding.

The general principles of res judicata and collateral estoppel are consistent with the court of appeals' decision to allow the respondent to maintain a civil action notwithstanding his guilty plea. That court correctly interpreted and distinguished its own prior decisions, as well as this Court's holdings in *Allen v. McCurry*, 449 U.S. 90 (1980) and *Montana v. United States*, 440 U.S. 147 (1979).

ARGUMENT

I. 28 U.S.C. § 1738 REQUIRES THAT A VIRGINIA JUDGMENT OF CONVICTION BE GIVEN NO GREATER EFFECT IN THE FEDERAL COURTS THAN IT WOULD BE GIVEN BY VIRGINIA COURTS.

The Judicial Code, 28 U.S.C. § 1738 (1976), extends the application of the full faith and credit clause, U.S. Const. art. IV, § 1, to the federal courts, requiring that they give the same effect to a state court judgment as would be given by the courts of the state rendering the judgment. *Kremer v. Chemical Construction Corp.*, 102 S. Ct. 1883 (1982) (title VII action). The effect of a state court judgment under § 1738 includes its preclusive effect under state law. As this Court said in *Kremer:*

> It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and *commands* a federal court to accept the rules *chosen by the state from which the judgment is taken.*

Id. at 1897 (emphasis added).

Although *Kremer* held that a federal court must give as much preclusive effect to a state court's judgment as that state's court would, 28 U.S.C. § 1738 also requires that a federal court respect a state rule permitting relitigation following judgment. This Court's language in *Kremer* is quite clear: If a state has rules regarding the effect of state court judgments in subsequent

suits, then § 1738 "commands" the federal court to apply these rules. 102 S. Ct. at 1897.

Long ago, this Court considered the effect to be given state rules regarding the nonpreclusive effect of state judgments. In *Union & Planters' Bank v. Memphis*, 189 U.S. 71 (1903), a bank had won a judgment in the Supreme Court of Tennessee that declared ad valorem tax assessments by the city of Memphis invalid as a violation of the bank's charter and the contracts clause, U.S. Const. art. I, § 10. This Court, in a separate case, later decided that the bank's charter provided no such exemption.[1] When the city then sought to assess ad valorem taxes for a later year, the bank sought suit in federal circuit court challenging the assessment, pleading the prior Tennessee Supreme Court judgment as res judicata. On appeal from the circuit court, this Court held that state law governed the preclusive effect to be given the prior state judgment by the federal courts, and further explicitly held that the state judgment could be given no greater effect in the federal courts than it would be given in Tennessee courts:

> [The] effect of a judgment of a state court should have as *res judicata* is a question of state or local law....
>
> As the judgment pleaded had no force or effect in the Tennessee state courts other than as a bar to the identical taxes litigated in the suit, the Courts of the United States can afford it no greater efficacy.

189 U.S. at 75 (citations omitted).

Covington v. First National Bank, 198 U.S. 100 (1905), involved a similar prior judgment in a Kentucky circuit court, affirmed by the state's court of appeals. Because the settled

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[1] County of Shelby v. Union & Planters' Bank, 161 U.S. 149 (1896).

rule in Kentucky was that an adjudication in a suit for taxes would not estop an action to collect taxes for any other year, this Court followed *Union & Planters'* and held that the prior state judgment should be given no effect in federal court:

> We are now dealing with the weight to be attached to a state judgment when pleaded as *res judicata* in a Federal court. That was the very question decided by this court in the case of *Union & Planters' Bank v. Memphis*, . . . wherein it was held that the Federal courts were not required to give to such judgments any greater force or effect than was awarded to them by the courts of the State where they were rendered.

198 U.S. at 109.
This Court so held notwithstanding that a different rule of estoppel then prevailed in federal courts. *Id.* at 108. Although language from the *Covington* opinion quoted above may appear to retreat somewhat from the position announced in *Union & Planters'*, the result of the case does not suggest that federal courts have authority under § 1738 to grant a state judgment *greater* preclusive effect than courts of the judgment-rendering state would itself grant.

Kremer reinforces the argument that state law governs the scope of the preclusive effect of a state judgment. The Court of Appeals for the Fifth Circuit recognized this recently in *Folsom Investment Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982). The plaintiff brought an action in federal district court under 42 U.S.C. § 1983 seeking damages for an allegedly unconstitutional attachment of 200 acres of his realty. The district court granted defendants' motion for summary judgment, holding that a prior Louisiana judgment on the attachment was res judicata as to the plaintiff's constitutional claims. The court of appeals reversed on this point, holding that under § 1738 the scope of the state judgment was necessarily a matter of state law. The court's opinion expressly relied on *Kremer* as prohibiting federal courts from giving state judgments greater preclusive effect than the judgment-rendering judisdiction:

> *Kremer* apparently dooms the assumption of many courts and commentators that federal courts may be free to grant *greater* preclusive effect to state court judgments than would the courts of the judgment-rendering state. Thus, we are not free to apply federal preclusion principles and must determine the preclusive effect of the Louisiana judgment by resort to the Louisiana law of res judicata.

681 F.2d at 1035-36 (footnote omitted) (emphasis in original). In the omitted footnote, the Fifth Circuit regarded the issue as having been resolved by *Union & Planters' Bank*. 681 F.2d at 1035 n.5. *Accord, e.g., Neale v. Goldberg*, 525 F.2d 332 (9th Cir. 1979) (federal courts bound by California law of res judicata as to preclusive effect of California judgment); *McCune v. Frank*, 521 F.2d 1152, 1156 (2d. Cir. 1975) (citing *Union & Planters'* to remand for determination of identity-of-parties issue in accordance with New York law of res judicata); *Bell v. City of Milwaukee*, 514 F. Supp. 1363 (E.D. Wis. 1981) (federal courts must apply state concepts of collateral estoppel and res judicata); *Holden v. Cities Service Co.*, 514 F. Supp. 662 (E.D. Tenn. 1980) (federal court may grant no greater preclusive effect than state would); *Menzel v. County Utilities Corp.*, 501 F. Supp. 354 (E.D. Va. 1979) (federal court must give same effect to state court decision as would be given by another court of the state). *Cf. Lefkowitz v. Newsome*, 420 U.S. 283 (1975) (habeas case).[2]

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[2] In *Lefkowitz*, this Court held that a guilty plea in a state criminal trial did not foreclose federal habeas review of antecedent constitutional defects, where the state permitted an accused to plead guilty but preserve specified constitutional claims. Stone v. Powell, 428 U.S. 465 (1976), of course, partly limited *Lefkowitz* and other cases by foreclosing federal habeas corpus review of most fourth amendment claims arising out of state criminal prosecutions. However, *Lefkowitz* continues to reinforce the principle that federal courts must look to state law to determine the scope of a state judgment. New Jersey v. Portash, 440 U.S. 450, 455 n.4 (1979).

The policies underlying § 1738, identified in *Kremer*, also support the Fifth Circuit's interpretation of that case. Section 1738 embodies important concepts of comity and federalism. A decision to accord Virginia judgments greater effect in federal courts than they receive in the courts of the Commonwealth would undermine the integrity of the Virginia judicial system, encourage forum shopping, and derogate from the protection against unfair surprise that Virginia accords its citizens through the state's application of res judicata and estoppel. Just as Virginia has an interest in having its judgments enforced regardless of the forum, it has an equal interest in the enforcement of its restrictions on the effect of those judgments. Thus, we ask this Court to respect the stated policies of the Commonwealth of Virginia regarding the effect to be given the judgments of its courts.

II. VIRGINIA WOULD NOT GIVE PRECLUSIVE EFFECT TO A CRIMINAL JUDGMENT IN A SUBSEQUENT CIVIL ACTION AS TO ANY ISSUE NOT ACTUALLY AND NECESSARILY DETERMINED IN THE CRIMINAL PROCEEDING.

Virginia precludes a party from relitigating an issue in two situations: (1) A party is precluded from litigating an issue that he had a full and fair opportunity to litigate in a prior proceeding *based on the same cause of action*, and (2) A party is precluded from relitigating any issue *actually and necessarily determined* in a prior proceeding *based on a different cause of action*. Virginia courts have labeled the first preclusive doctrine res judicata and the second, collateral estoppel. *Bates v. Devers*, 214 Va. 667, 202 S.E.2d 917 (1974). The use of these terms by Virginia courts differs somewhat from the usage of other jurisdictions. Distinguishing between the two preclusive doctrines is essential in the present case.

In *Eason v. Eason*, 204 Va. 347, 131 S.E.2d 280 (1963), the Virginia Supreme Court clearly articulated the distinction between the two doctrines. The complainants had originally sued to contest the will of their still-living aunt, claiming that she was incompetent. While the appeal of that action was

pending, the complainants sued for specific performance of certain agreements by the aunt to devise land to them. In the first proceeding, the complainants had introduced releases signed by them that relieved the aunt of any duty to devise the land to the complainants. After the complainants lost their suit contesting the will, the aunt moved to preclude them from litigating the validity of the agreements to devise in the subsequent action. The aunt based her motion on the complainants' introduction of the releases in the prior suit. The Virginia Supreme Court found that the two suits were based on different causes of action, and accordingly held:

> "'[W]here the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry *must always be* as to the point or question actually litigated and determined in the original action; *not what might have been thus litigated and determined.* Only upon such matters is the judgment conclusive in another action.'"

204 Va. at 350, 131 S.E.2d at 282 (emphasis added) (quoting *Kemp v. Miller*, 166 Va. 661, 674-75, 186 S.E. 99, 104 (1936) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1876)). Because the determination of the validity of the agreements to devise was not necessary to the finding that the aunt was competent, litigation of the issue was not precluded by the judgment in the prior suit.

Similarly, in *Bates v. Devers*, 214 Va. 667, 202 S.E.2d 917 (1974), the Virginia Supreme Court held that the dispositive issue in determining whether the application of res judicata or collateral estoppel was proper in a given case is whether the two

suits constitute the same cause of action. The court explained the two preclusive doctrines, stating:

> *Res judicata-bar*, is the particular preclusive effect commonly meant by use of the term "res judicata." A valid, personal judgment on the merits in favor of the defendant bars relitigation of *the same cause of action*, or any part thereof which could have been litigated between the same parties and their privies. . . . .
>
> *Collateral estoppel* is the preclusive effect impacting in a subsequent action based upon a collateral and *different cause of action*. In a subsequent action, the parties to the first action and their privies are precluded from litigating any *issue* of fact actually litigated and essential to a valid and final personal judgment in the first action.

Id. at 670-71, 202 S.E.2d at 920-21 (citing Restatement of Judgments §§ 47, 62, 68, 82, 83 (1942)) (footnotes omitted) (emphasis in original). *See also Cohen v. Power*, 183 Va. 258, 32 S.E.2d 64 (1944) (fact that issue could have been raised in prior proceeding does not justify preclusion as to that issue in subsequent suit based upon different cause of action).

The *Bates* opinion has been cited in recent Virginia cases and commentaries as explaining Virginia's treatment of res judicata and collateral estoppel. *See, e.g., Norfolk & Western Railway Co. v. Bailey Lumber Co.*, 221 Va. 638, 640, 272 S.E.2d 217, 218 (1980); T. Boyd, E. Graves & L. Middleditch, *Virginia Civil Procedure* § 12.11, at 463 n.78, 465 n.81 (1982) [hereinafter cited as *Virginia Civil Procedure*].[3]

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[3] The American Law Institute's current treatment of this issue is identical to the approach taken in *Bates*. *See* Restatement (Second) of Judgments § 27 comment e (1982). The Restatement (Second) authors rejected "opportunity" to litigate as a justification for the application of estoppel in a subsequent suit based on a different cause of action. *Id. See also* Hazard, *Revisiting the Second* Restatement of Judgments: *Issue Preclusion and Related Problems*, 66 Cornell L.Q. 564 (1981).

The Virginia Supreme Court recently reaffirmed its distinctive use of res judicata and collateral estoppel in *Greene v. Warrenton Production Credit Association,* 223 Va. 462, 291 S.E. 2d 209 (1982). The two litigants had been codefendants in a prior attachment proceeding brought by a bank. Greene later brought an action against Warrenton for breach of its fiduciary duty. Warrenton pleaded res judicata and estoppel. The Virginia Supreme Court refused to invoke res judicata. The court then expressly followed *Bates v. Devers* to hold that, because the two suits involved different causes of action and the breach issue had not been actually and necessarily litigated in the prior suit, Greene could not be collaterally estopped from litigating the issue of breach of fiduciary duty. *Id.* at 466-67, 291 S.E.2d at 212.

Prosise's § 1983 suit clearly does not constitute the same cause of action as the state's criminal prosecution for the manufacture of illegal drugs. Nor can it be said that the constitutionality of the search of Prosise's apartment was actually and necessarily litigated by his conviction on a plea of guilty to the criminal charge. Neither res judicata nor collateral estoppel would be invoked by the Virginia courts to preclude Prosise's § 1983 action.

A. Res Judicata

Virginia courts invoke the doctrine of res judicata in a subsequent suit only when that suit is based on the same cause of action as the prior suit. What constitutes the "same cause of action" was explained by the Virginia Supreme Court in *Cohen v. Power:*

> If the same facts or evidence would sustain both actions, then the two actions are considered the same and a judgment in one bars any subsequent cause of action based upon the same facts. If different proof is required to sustain the different actions, a judgment in one is no bar to the maintenance of the others. . . .

183 Va. at 261, 32 S.E.2d at 65 (citation omitted).

Prosise need not prove his innocence in order to establish that the search of his apartment violated the fourth amendment; nor does the state have to demonstrate the legality of the officers' search in order to sustain the conviction. Other evidence than that seized was available to and subsequently used by the state. Thus the "same facts or evidence" are not necessary to sustain both actions.

B. Collateral Estoppel

Collateral estoppel would not be invoked by Virginia courts in the present case because the constitutionality of the search of Prosise's apartment was never litigated in the criminal trial, and because proof that a fourth amendment violation did not occur was not essential to the trial court's finding that Prosise was guilty of the manufacture of illegal drugs.

Virginia invokes the doctrine of collateral estoppel only when the issue sought to be precluded has been actually and necessarily litigated in a prior proceeding. *Aetna Casualty & Surety Co. v. Anderson*, 200 Va. 385, 105 S.E.2d 869 (1958). This rule was recently reaffirmed in *Luke Construction Co. v. Simpkins*, 223 Va. 387, 291 S.E.2d 264 (1982) and *Norfolk & Western Railway Co. v. Bailey Lumber Co.*, 221 Va. 638, 272 S.E.2d 217 (1980).[4] The burden of proof to demonstrate that the

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[4] *Cf.* Ridley v. Leavitt, 631 F.2d 358 (4th Cir. 1980) (per curiam), which reached a similar result without expressly relying on Virginia's estoppel doctrines. In *Ridley*, the plaintiff brought a § 1983 action against six deputy sheriffs for severe beatings he allegedly received while in pretrial detention in a Norfolk city jail. Defendants attempted to invoke plaintiff's prior state criminal conviction for assault on three of the deputies, arising out of the same incident, to estop the plaintiff from litigating his claim of use of excessive force by defendants. The court of appeals refused to invoke collateral estoppel, stating that the issue of excessive use of force had not been determined by the prior conviction on the assault charges, even though the § 1983 litigant had adequate opportunity to raise the issue in the prior criminal proceeding. This view of collateral estoppel comports with the Virginia rule.

issue has been actually and necessarily litigated in the prior proceeding rests with the party attempting to invoke collateral estoppel. *Lee v. Commonwealth*, 219 Va. 1108, 254 S.E.2d 126 (1979).

A glance at the transcript of Prosise's state proceedings compels the conclusion that the question of whether Prosise's fourth amendment rights were violated by petitioners' search of his apartment was never litigated. This fact alone prevents the application of collateral estoppel under Virginia law.

The other prerequisite for the application of collateral estoppel is also lacking here. A finding by the criminal trial court as to the legality of the search and seizure, even had such a finding been made, would not have been essential to the judgment of conviction.

In *Petrus v. Robbins*, 196 Va. 322, 83 S.E.2d 408 (1954), the plaintiff had been the defendant in a prior suit for damages arising from an automobile accident. In that first suit, the defendant counterclaimed for damages to her car. The court found that both parties had been negligent and denied both recovery. The original defendant subsequently brought suit against the original plaintiff for personal injuries arising from the accident. After concluding that the second suit was a different cause of action, the Virginia Supreme Court held that the plaintiff was precluded from relitigating the issue of her negligence since it had been actually litigated in the first suit and the finding of negligence was necessary to dispose of her counterclaim in that action. The court stated:

> [T]o render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined — that is, that the verdict *could not have been rendered without deciding that matter* . . . .

Id. at 330, 83 S.E.2d at 412 (emphasis added) (citing *Russell v. Place*, 94 U.S. 606, 608 (1876)).

Similarly, in *Eason v. Eason*, the court stated:

> In order, therefore, for the decree in the will case to be conclusive of the issues in the present suit, it must appear by the record of the prior litigation that the question of the effect of the releases was "actually litigated and determined," that is, that the verdict in favor of the validity of the will *could not have been rendered* without deciding such effect.

204 Va. at 350, 131 S.E.2d at 282 (emphasis added).

In *Lee v. Commonwealth*, 219 Va. 1108, 254 S.E.2d 126 (1979), the defendant was allowed to invoke collateral estoppel in a state prosecution for hit and run and manslaughter after misdemeanor charges of driving with a revoked license had been dropped for lack of evidence that he had been driving the car. Although *Lee* turned on jeopardy issues, the court enunciated Virginia's standard for the application of collateral estoppel, stating: "The doctrine of collateral estoppel does not apply if it appears that the prior judgment could have been grounded 'upon an issue other than that which the defendant seeks to foreclose for consideration.' " *Id.* at 1111, 254 S.E.2d at 127 (citing *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)). In *Lee*, there was an express finding that the prior judgment could not have been so grounded.

Thus, the question is: Was a finding that Prosise was not subjected to an unconstitutional search essential to Virginia's judgment of conviction on the plea of guilty? The answer is clearly negative. In a Virginia criminal case, a guilty plea alone is sufficient evidence to sustain a conviction. As stated in *Welborn v. Cox*, 337 F. Supp. 16 (W.D. Va. 1971):

> [A] conviction obtained upon such a plea is based solely on the plea and not upon any evidence which may have been acquired by the prosecuting authorities.

Id. at 17 (citing *Camm v. Peyton*, 229 F. Supp. 485 (W.D. Va. 1969) (other citation omitted). *See also Knight v. Johnson*, 529 F. Supp. 1309 (E.D. Va. 1982).

The fact that an evidentiary hearing took place after Prosise's entry of a guilty plea does not warrant a conclusion that the evidence introduced in that proceeding was essential to the finding of guilt. In *Kibert v. Commonwealth*, 216 Va. 660, 222 S.E.2d 790 (1976), the Virginia Supreme Court held that the introduction of evidence to sustain a conviction based on a guilty plea was unnecessary in any criminal case. The decision to hear such evidence rests entirely within the trial judge's discretion. *Knight v. Johnson*, 529 F. Supp. at 1319 (citing *Kibert; Hobson v. Youell*, 177 Va. 906, 15 S.E.2d 76 (1941)). The purpose of hearing such evidence is to establish aggravating or mitigating factors pertinent to sentencing. *Knight*, 529 F. Supp. at 1321. Thus, the introduction of such evidence at Prosise's trial was not *essential* to a finding of guilt or to the judgment rendered on the plea of guilty. Because the evidence was not essential, a finding that the evidence was obtained constitutionally was also not essential to the judgment. Therefore, the issue of whether the evidence was obtained in violation of the fourth amendment cannot be precluded under the general doctrine of collateral estoppel as applied by the Virginia courts.

Eagle, Star & British Dominions Insurance Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927), treated in the opinion below as a single exception to a general Virginia rule against granting preclusive effect to criminal judgments in subsequent civil actions,[5] in fact illustrates the application of Virginia's requirement that the matter sought to be precluded must have been actually and necessarily litigated in the prior proceeding. Heller had been found guilty of arson but later brought suit to recover fire insurance benefits on the very house he had burned

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[5] Prosise v. Haring, 667 F.2d 1133, 1139 (4th Cir. 1981), *cert. granted*, 103 S. Ct. 205 (1982). The issue in *Heller* that has received the most attention is the Virginia Supreme Court's deviation from a former strict mutuality requirement when a party sought to invoke collateral estoppel defensively. That court has since held that *Heller* qualified the mutuality requirement in Virginia, but does not eliminate it. *See Bates v. Devers*, 214 Va. 667, 202 S.E.2d 917 (1974); *Virginia Civil Procedure, supra* p.10, § 12.11, at 468-71.

down. Because the issue actually litigated and essential to Heller's conviction was also dispositive of the issue of liability under the policy in the second suit, the Virginia Supreme Court held him estopped from litigating the claim against the insurer. Therefore, the requirement of "actual and necessary" adjudication had been met.

The only case that might be thought to be inconsistent with the clearly established Virginia law set forth herein is *Cramer v. Crutchfield,* 648 F.2d 943 (4th Cir. 1981) (per curiam). But *Cramer,* on careful consideration, actually is in accord with Virginia estoppel doctrine. Cramer was convicted in a contested trial when evidence he later claimed was illegally seized was used against him. After the conviction, he brought a § 1983 action, alleging an unconstitutional search and seizure, malicious prosecution, and abuse of process. In support of the last two claims, Cramer urged that the evidence could not have properly been used against him. The court found that the limitations period applicable to the search and seizure claim had expired, and held that the remaining claims could not be maintained against officers who had produced admissible evidence against Cramer in state court. In other words, the remedy for *introduction* of illegally seized evidence is an objection at trial, not a subsequent action under § 1983. Had the Virginia statute of limitations for personal injury actions not expired in *Cramer,* the plaintiff would have been free to maintain his action for the alleged unlawful *search and seizure.*[6]

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[6] In the opinion below, the court of appeals distinguished its earlier holding in *Cramer* in a different fashion. The court noted that the state judgment of conviction given preclusive effect in *Cramer* was based on an adjudication of guilt in a contested trial, not on a plea of guilty. *Prosise,* 677 F.2d at 1138. The court observed that Prosise's guilty plea obscured a fact made clear in *Cramer:* The evidence used to convict in the state criminal prosecution was the same evidence obtained in the search which formed the basis for the later § 1983 action, and the plaintiff therefore had adequate incentive to seek suppression of the evidence in the state criminal trial. *Id.* at 1142 n.15. As the court noted, in a guilty plea case, the presence of an attractive plea bargain, the availability of other evidence to support the prosecution, and related factors may clearly indicate that the party later sought to be estopped lacked adequate incentive to litigate "to the hilt" issues relating to the

The opinion of the court of appeals in the present case overstates the matter when it suggests that Virginia accords no preclusive effect to criminal judgments in subsequent civil litigation, *Prosise*, 667 F.2d at 1139, and when it adopts a general rule of nonpreclusion in criminal guilty plea cases. *Id.* at 1142. Instead, Virginia requires that any matter sought to be precluded have been actually and necessarily litigated in the criminal trial. The absence of any case, except *Heller*, in which preclusive effect has been accorded to issues arising out of a criminal judgment, demonstrates that Virginia's test is a rigorous one, and that it is stringently applied.

III. PRECLUDING A DEFENDANT IN A STATE CRIMINAL PROCEEDING FROM PLEADING GUILTY AND SUBSEQUENTLY PURSUING A CIVIL ACTION FOR VIOLATION OF HIS CONSTITUTIONAL RIGHTS WOULD NOT FURTHER THE POLICIES UNDERLYING PRECLUSION OF CLAIMS OR ANY FEDERAL INTEREST, WHILE IT WOULD FRUSTRATE IMPORTANT STATE INTERESTS AND UNDULY BURDEN STATE COURTS.

Preclusion of claims generally occurs when claims have been fully litigated in a prior proceeding. *See Allen v. McCurry*, 449 U.S. 90 (1980); *Montana v. United States*, 440 U.S. 147 (1979); *Rimmer v. Fayetteville Police Department*, 567 F.2d 273 (4th Cir. 1977). Several policies support preclusion. It conserves scarce judicial resource by permitting courts to decide a claim on a single

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admissibility of evidence seized in a search claimed to violate the fourth amendment. *Id.* at 1141.

This Court has expressed its approval of plea bargaining as an element of a state's judicial system. *See Bordenkircher v. Hayes*, 434 U.S. 357 (1978). To require that one vindicate his constitutional right to privacy by making an evidentiary motion in a state criminal trial would create serious determents to the efficient operation of the plea bargaining procedure.

occasion. It also serves notions of comity; a second court will respect what another court has first determined. Finally, it protects against harassment of and inconvenience to litigants by assuring that, once a claim has been fairly heard and resolved, it will not be heard again.

With these policies in mind, it is understandable that a defendant in a criminal case who chose to litigate fully a fourth amendment claim and lost might be estopped from relitigating the claim in a subsequent civil action. *See Allen v. McCurry.* Similarly, were a defendant to win on a motion to suppress in state court, that victory might preclude a police officer in a subsequent civil action from contending that a search and seizure was valid (assuming that the officer was treated under state law as a party in privity with the state in the criminal case). *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979). The instant case differs from both of these situations, however, in that Prosise's fourth amendment claim was never heard in state court.

Because the claim was not previously raised in state court, there is no repetitive use of judicial resources, no comity concern, and no threat of harassment of or inconvenience to litigants in the federal action. Thus, none of the policies supporting the general notion of preclusion applies in the context of this case. But substantial state interests would be impaired by a holding that a defendant who pleads guilty without raising a fourth amendment claim on a motion to suppress loses the right to bring a subsequent civil rights suit. These state interests are preserved under § 1983, for "[t]o the extent that it did intend [through enactment of § 1983] to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion." *Allen,* 449 U.S. at 100.

First, a state understandably may wish to impose swift punishment on those who violate its laws. The very idea of a guilty plea implements this interest. The person who pleads guilty accepts punishment without delay and thus triggers the rehabilitative and deterrent forces of the criminal justice system. Requiring a defendant whose constitutional rights have been

violated to raise such claims in a motion to suppress and to litigate fully those claims would significantly impede state processes in cases in which both the prosecution and defense are willing to move forward without delay. There is no federal interest in retarding state proceedings, yet there is a threat to important state interests.

Second, to require a state criminal defendant to raise a fourth amendment claim in state court as a precondition to a subsequent civil rights action would frequently compel litigation of issues involving evidence having little bearing on the criminal case. In other words, even where a prosecutor has overwhelming evidence aside from that seized illegally, a defendant, knowing full well that a motion to suppress could not affect the outcome of his case, would have to make the motion and waste the time of the state trial court and prosecutor simply to preserve a point for subsequent litigation. Motions to suppress on points almost irrelevant to state criminal proceedings could cause prosecutors and judges to treat defendants who made them more harshly than they otherwise might. Yet a defendant who wished to avail himself of his civil remedy would have no choice but to make such motions, and defense counsel's professional and ethical obligations would undoubtedly require him to litigate such issues in order to serve the client and preserve his rights. Failure to do so, even if sensible in the context of a criminal trial, could subject counsel to malpractice claims for failure to protect his client's civil rights. Moreover, were the trial court's suppression rulings deemed harmless by an appellate court, it would decline to correct them, even if erroneous. The civil rights litigant would be effectively deprived of appellate review of incidental rulings defeating fundamental substantive rights.[7] And there are still other problems. In Virginia, it is not clear that one who pleads guilty can preserve antecedent constitutional claims for appeal. If a defendant is forced to move for suppression of evidence and loses his motion, he might be

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[7] It is well worth noting in this context that Virginia criminal defendants have no right of automatic appeal to the Virginia Supreme Court, except in captial cases. There is no intermediate appellate court in Virginia.

compelled actually to go to trial for the sole purpose of preserving his right to bring a subsequent civil action. As a result, defendants who prefer to plead guilty, and prosecutors who prefer to accept such pleas, could find themselves going to trial when neither want to. Such unnecessary trials would serve no important federal interests, but would certainly sacrifice important state interests.

Third, were a state to permit a defendant to plead guilty and preserve the right to appeal an unsuccessful motion to suppress evidence, state appellate courts might be faced with cases that involve no real controversy between the prosecution and the defense — i.e., both might want to leave the guilty plea and the resulting judgment undisturbed and obtain a ruling on a search and seizure claim that neither wishes to litigate in a criminal setting. *Cf. Lefkowitz v. Newsome.* It cannot be determined whether a court would decline to rule in such cases. If it did decide to rule, the state appellate court might again find that any error with respect to the denial of the motion to suppress was "harmless" in light of either the parties' willingness to enter into a plea bargain or other evidence in the case, without actually deciding if there was error. The result would be a tremendous waste of judicial resources without a decision on the only legal question that concerned anyone. Our judicial system is ill-equipped to decide issues inapposite to the matter at hand. For this Court now to require that state trial and appellate courts do so would serve no important federal interests, but would threaten vital state interests.

Fourth, under the approach taken by this Court in *Lefkowitz*, pleas might be taken with the explicit understanding that the plea does not bar subsequent civil litigation. However, requiring such an explicit statement might result in prosecutors negotiating civil liability of police officers in the course of plea bargaining, trading criminal punishment for release of a civil claim. This Court should not encourage this type of bartering, which raises the most serious ethical problems. Federal interests would not be served, and state interests would be defeated.

Finally, this Court recognized in *Lefkowitz* that the finality of state criminal judgments is a matter properly determined by

reference to state law. 420 U.S. at 288-92. State authorities share concurrent jurisdiction over civil rights claims with federal courts. This Court should respect the long-standing and widely-shared belief among state court systems that claims not litigated should not be precluded. *Cf. Allen*, 449 U.S. at 99 ("Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict traditional doctrines of preclusion.")

This court has never ignored a state's policy that litigants need not raise certain claims in a particular forum. In fact, in *Allen* — the most important case involving preclusion and § 1983 — this court quoted the full faith and credit statute and emphasized that how state courts enforce their judgments should determine how federal courts enforce them. 449 U.S. at 99. The preclusive effect of a state judgment is a matter determined by reference to state law.

Amicus curiae does not argue that Congress could not amend § 1738 or override it in particular cases by subsequent legislation. Indeed, Congress might well require criminal defendants to have successfully raised a claim in state court before bringing a civil rights action. But before the courts ignore traditional principles of res judicata and collateral estoppel and the full faith and credit statute, there must be some indication that Congress wished to impose on state courts the burdens described in this brief. *Amicus curiae* finds nothing in any congressional enactment to justify a departure from the full faith and credit statute, which has not been substantively altered since its enactment in 1790. Any departure from the honored principles it embodies would be inconsistent with the approach taken in *Allen v. McCurry*. "Since repeals by implication are disfavored, *Radzanover v. Touche Ross & Co.*, 426 U.S. 148, 154, . . . [clear] support would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits." *Allen*, 449 U.S. at 99. *See also Kremer*, 102 S. Ct. at 1892 (§ 1983 does not implicitly repeal the application of § 1738).

Where a state's law of preclusion permits a defendant who has plead guilty to bring a subsequent civil action, nothing in any

congressional enactment nor in any justice-based policy supports a federal decision to ignore state law and deny the defendant the opportunity to vindicate his constitutional rights in a civil action. Indeed, reason, federal law, and the general understanding of preclusion require that Virginia's protection of its citizens' rights be respected.

CONCLUSION

For the foregoing reasons, *amicus curiae* believes that this Court should affirm the decision of the Court of Appeals.

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